No. 86-453

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RANDALL F. CARSON and SUSAN CARSON,
Petitioners,

vs.

JOHN R. BLOCK, Individually and as Secretary of Agriculture for the United States; CHARLES W. SHUMAN, Individually and as Administrator of Farmers Home Administration, a Department within the United States Department of Agriculture; ROBERT CHAMBERS, Individually and as the Illinois State Director of the Farmers Home Administration, A department within the United States Department of Agriculture; JAMES REIFSTECK, Individually and as the Head of Farmers Programs for the Farmers Home Administration; FREDERICK P. KOCHER, Individually and as Farm Program Specialist for the Farmers Home Administration, a Department within the United States Department of Agriculture, LOUIS O'DELL, Individually and as the District Director for the West Central Illinois Region of the Farmers Home Administration, a Department within the United States Department of Agriculture; DONALD BURNS, Individually and as Assistant District Director of the Farmers Home Administration, a Department within the United States Department of Agriculture; and I. BRYANT BILDERBACK, Individually and as the McDonough County, Illinois Supervisor for the Farmers Home Administration, a Department within the United States Department of Agriculture,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether an applicant for statutory benefits, where the statutory scheme identifies applicant as a member of the beneficiary class and places substantive limitations on official discretion, has a property interest protected by the due process clause of the Fifth Amendment in being heard on his application for those benefits?

PARTIES IN THE COURT BELOW

Petitioners Randall F. Carson and Susan Carson were the Plaintiffs-Appellees in the court below. Respondents John R. Block, Charles W. Shuman, Robert Chambers, James Reifsteck, Frederick P. Kocher, Louis O'Dell, Donald Burns, and I. Bryant Bilderback were the Defendants-Appellants below.

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No.

IN THE

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RANDALL F. CARSON and SUSAN CARSON,
Petitioners,

vs.

JOHN R. BLOCK, Individually and as Secretary of Agriculture for the United States; CHARLES W. SHUMAN, Individually and as Administrator of Farmers Home Administration, a Department within the United States Department of Agriculture; ROBERT CHAMBERS, Individually and as the Illinois State Director of the Farmers Home Administration, A department within the United States Department of Agriculture; JAMES REIFSTECK, Individually and as the Head of Farmers Programs for the Farmers Home Administration; FREDERICK P. KOCHER, Individually and as Farm Program Specialist for the Farmers Home Administration, a Department within the United States Department of Agriculture, LOUIS O'DELL, Individually and as the District Director for the West Central Illinois Region of the Farmers Home Administration, a Department within the United States Department of Agriculture; DONALD BURNS, Individually and as Assistant District Director of the Farmers Home Administration, a Department within the United States Department of Agriculture; and I. BRYANT BILDERBACK, Individually and as the McDonough County, Illinois Supervisor for the Farmers Home Administration, a Department within the United States Department of Agriculture,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioners, Randall F. Carson and Susan Carson pray that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Seventh Circuit in the case *Carson v. Block,* 790 F.2d 562 (7th Cir. 1986), rehearing denied June 24, 1986, reversing *Carson v. Block,* No. 83-1073, unpublished, CD. Ill., Peoria Division, August 22, 1985.

OPINION BELOW

The opinion of the United States Court of Appeals is reported as set out above and a copy of it is attached as Appendix A to this petition. (App. 1).

JURISDICTION

The jurisdiction of this Court is invoked under 28*U.S.C.* §1254(1), this Petition being filed within ninety (90) days of the denial of Petitioners' Petition for Rehearing, June 24, 1986, a copy of which Order is attached as Appendix B to this petition. (App. A-9).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Constitution of the United States, Amendment 5, providing in relevant part that "no person . . . shall be . . . oeprived of life, liberty, or property, without due process of law . . ."

B. 7 *U.S.C.* §1981a, providing in full as follows:

> In addition to any other authority that the Secretary (of Agriculture) may have to defer principal and interest and forego foreclosure, the Secretary may permit, at the request of the borrower, the deferral of principal and interest on any outstanding loan made, insured, or held by the

Secretary under this title, or under the provisions of any other law administered by the Farmers Home Administration, and may forego foreclosure of any such loan, for such period as the Secretary deems necessary upon a showing by the borrower that due to circumstances beyond the borrower's control, the borrower is temporarily unable to continue making payments of such principal and interest when due without unduly impairing the standard of living of the borrower. The Secretary may permit interest that accrues during the deferral period on any loan deferred under this section to bear no interest during or after such period: provided, that if the instruments securing such a loan is foreclosed such interest as is included in the purchase price at such foreclosure shall become part of the principal and draw interest from the date of foreclosure at the rate prescribed by law.

STATEMENT OF THE CASE

Petitioners brought this action in the District Court by filing a one count complaint alleging a cause of action pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971). Jurisdiction was asserted under 28 *U.S.C.* §1331(a) and pursuant to the Declaratory Judgment Act, 28 *U.S.C.* §2201. The Complaint was later amended to add a second count not relevant to this Petition which remains pending in the district court. The Petitioners alleged that Respondents, officials of the Farmers Home Administration (FmHA), had deprived Petitioners of what they alleged was their right to be considered for loan deferral relief under 7 *U.S.C.* §1981a without due process of law.

The Respondents filed an answer generally denying the allegations of Petitioners' complaint and alleging various affirmative defenses including the defense of qualified good faith immunity under *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). Respondents thereafter filed a separate motion for summary judgment argu-

ing *inter alia* that the Respondents were entitled to qualified good faith immunity under *Harlow, supra.*

On August 22, 1985, the District Court entered an order denying Respondents' motion for summary judgment. (A copy of that order in the form of a docket entry appears in the Appendix as Appendix C at Page App. A-11). Respondents thereafter filed their notice of appeal pursuant to this court's holding in *Mitchell v. Forsyth,* 472 U.S.____, 105 S.Ct. ____, 86 L.Ed.2d 411 (1985).

On May 17, 1986, the United States Court of Appeals for the Seventh Circuit reversed the District Court, but did not directly address the *Harlow v. Fitzgerald* qualified immunity question. Rather, that court held, relevant to this Petition, that Petitioners had no Constitutionally protected property interest under 7 *U.S.C.* §1981a. On June 24, 1986, the Seventh Circuit denied Petitioners' Petition for Rehearing and suggestion for rehearing en banc.

STATEMENT OF THE FACTS

On December 7, 1981, Randall Carson, a dairy farmer in McDonough County, Illinois and FmHA borrower, did not, by reason of circumstances beyond his control, have sufficient funds with which to purchase feed for his dairy herd. For that reason, he asked Respondent I. Bryant Bilderback, the FmHA McDonough County, Illinois County Supervisor, to release to him a portion of the monthly receipts from the sale of his dairy production Carson had assigned to the FmHA as payment of his debt. Bilderback refused to do that.

Thereafter, Carson read in a farm journal about 7 *U.S.C.* §1981a which Carson understood to allow FmHA County Supervisors to defer loan payments under various circumstances. With this understanding, on December 14, 1981, Carson again contacted Bilderback to see if Bilderback would consider deferring his payments by releasing the money Carson

had assigned to FmHA. Carson testified that he requested that his loan payments be deferred by this means for a period of five months to allow some of his heifers to "come fresh" so as to increase his production. However, Carson testified that Bilderback replied he was not aware of any statutory authority such as that to which Carson was referring and that the answer was therefore no. Bilderback further advised that Carsons consider liquidation of their farming operation.

Carson alleged in his complaint that because Bilderback would not consider his request for a five-month deferral of his loan payments, Carson had no funds with which to purchase feed for his dairy herd. He feared his dairy herd was in danger of starvation. Therefore, he sought legal advice and pursuant thereto filed a Chapter 11 (11 *U.S.C.* §1101) petition for bankruptcy on January 5, 1982. His assumption in doing this was that the Chapter 11 proceeding would have the effect of staying his loan payments to the FmHA.

However, when Carson and his lawyer realized that the Chapter 11 petition did not have the effect of staying his loan payments, Carson, on February 16, 1982, converted the Chapter 11 bankruptcy to a straight bankruptcy pursuant to Chapter 7 of the Bankruptcy Act (11 *U.S.C.* §701). The effect of this, as was its purpose, was to cause title to the dairy herd to revert to the first lien holder, the FmHA, in order that the dairy cattle would be fed.

The resulting bankruptcy adjudication caused the release of Carson's mortgaged farm to first mortgagee, a private mortgage company in Macomb, Illinois. It also caused the release of Carson's farm machinery and equipment to the FmHA which had a first security interest. Thereafter, during the summer of 1982, the first mortgagee foreclosed on the farm and during the subsequent foreclosure sale, the FmHA, holder of the second mortgage, purchased the farm. By that time, Carson was off the farm which had been in his family for two generations and had moved himself and his family to Iowa. However, the Carsons'

residence which was situated on a small lot adjacent to what had been their farm was not subject to any of the bankruptcy or foreclosure proceedings.

At the end of the summer of 1982, the Carsons returned to their Illinois residence adjacent to what had been their farm. By this time the FmHA was completing procedures relative to the sale of what had been the Carsons' farm machinery equipment, all of which was physically located on what had been their farm. An auction sale of that machinery and the equipment was scheduled for November 18, 1982. On the day of the sale, the Carsons, their friends and neighbors, in a protest against what they felt had been the FmHA's improper failure to consider the Carsons' request for loan payment deferral treatment, protested and succeeded in "shouting down" the auction sale.

At this point, Respondent Bilderback stopped the sale and, not relevant to this Petition, agreed to entertain a new loan application from the Carsons. However, Bilderback, his superiors, the Respondents Chambers, Kocher, and Reifsteck on January 13, 1983 formally denied the new loan application. At this point, the Carsons sought legal advice and filed their lawsuit resulting in this Petition.

REASONS FOR GRANTING THE WRIT

The Writ Should Be Granted To Resolve The Important And Undecided Question Whether An Applicant For Statutory Benefits, Where The Statute Identifies Him As A Member Of The Beneficiary Class And Places Substantive Limitations On Official Discretion, Has A Property Interest In Being Heard On His Application For Those Benefits; A Split Among The Circuits Exists Respecting This Question.

The Seventh Circuit decided in this case that "to the extent a request (for statutory benefits) appeals to discretion rather than to rules, there is no property." 790 F.2d at 566, quoting *Scott v. Village of Kewaskum,* 786 F.2d 338, 340 (7th Cir. 1986). The Seventh Circuit held that "(t)he loan deferral program under 7 *U.S.C.* §1981a gives the FmHA discretion." 790 F.2d at 566. On this basis, the Seventh Circuit held that 7 *U.S.C.* §1981a did not create a property interest in an applicant for loan deferral relief in receiving consideration for that relief.

Nonetheless, the Seventh Circuit had previously held in *U.S. v. Markgraf,* 736 F.2d 1179 (7th Cir. 1984), that 7 *U.S.C.* §1981a entitled FmHA borrowers, such as the Petitioners, to be considered for loan deferral relief once they had applied for it and that that consideration was to be governed by "three substantive criteria". *Markgraf, supra* at 1185. The Seventh Circuit held that those criteria were (i) that the borrower's financial problems had been occasioned by "circumstances beyond his control"; *Id.,* (ii) that his inability to make repayments was temporary; and (iii) his inability to pay was such that to have made payments would have "unduly impair(ed) his standard of living". *Id.* Moreover, every Circuit Court of Appeals which has considered 7 *U.S.C.* §1981a has similarly held. See *United States v. Hamrick,* 713 F.2d 69 (4th Cir. 1983); *Ramey v. Block,* 738 F.2d 756 (6th Cir. 1984); *Allison v. Block,* 723 F.2d 631 (8th Cir. 1983); *Matzke v. Block,*

732 F.2d 99 (10th Cir. 1984); and *Curry v. Block,* 738 F.2d 1556 (11th Cir.1984).

Respecting the purpose of 7 *U.S.C.* §1981a, the Tenth Circuit stated in *Matzke v. Block, supra,* 732 F.2d 799, 801 that:

> Section 1981a was inserted into the complex farm loan structure, but its purpose and scope is clear. It provides for fundamental forms of relief in particular situations . . . .
>
> Congress has many times in connection with farm legislation expressed its objective to foster and encourage family farms . . . and to keep existing farms operating . . . . In 1978 Congress passed the Agriculture Credit Act of 1978 . . . with the expressed intention to expand the power of FmHA to meet the then acute financial needs and problems of farmers . . . .
>
> Congress intended to create a remedy or permit relief for certain borrowers for whom serious concern had been expressed because of repeated drought conditions and by reason of unusually low farm prices. These conditions created an urgent need and a particular form of relief was devised after extended study and debate. This was §1981a.

The Eighth Circuit in *Allison v. Block, supra* at 684, stated that "the precatory language in the House Report concerning the 1978 legislation which included §1981a stressed that the legislation was aimed at '(g)iving people a chance' and assisting farmers 'to remain in the land and carry on sound operations' . . . ."[1]

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[1] Prior to the Eighth Circuit's decision in *Allison, supra,* the United States District Court for the District of North Dakota had, on May 5, 1983, issued a preliminary injunction on behalf of a class of North Dakota farmers "who were or may be eligible to obtain a farmer program loan" against the FmHA from foreclosing until it had implemented the substance of 7 *U.S.C.* §1981a. *Coleman v. Block,* 562 F.Supp. 1353 (D. N.Dak. 1983). On October 8, 1983, the class was

(footnote continued)

In *Board of Regents v. Roth,* 408 U.S. 564, 576-578 (1972), this Court held that property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state (or federal) law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." On this same basis, this Court had, in *Goldberg v. Kelly,* 397 U.S. 254, 25 L.Ed.2d 287, 90 S.Ct. 1011 (1970), held that welfare recipients "had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them." *Roth, supra* at 577. See also *Cleveland Board of Education v. Loudermill,* 470 U.S. ____, 84 L.Ed.2d 294 (1985).

But, this Court held in *Olim v. Wakinekona,* 461 U.S. 238, 75 L.Ed.2d 813, 103 S.Ct. 1741 (1983), that no liberty, and presumably no property, interest is created where state prison regulations had created a pre-transfer hearing procedure but nonetheless reposed in the hearing officers "unfettered discretion", 461 U.S. at 250, to transfer or not to transfer "for whatever reason or no reason at all," *Id.,* quoting *Meachum v. Fano,* 427 U.S. 215, 228 (1976). The reason this Court so held in *Olim v. Wakinekona, supra* was that Hawaii's prison regulations "place(d) no substantive limitations on official discretion. *Wakinekona, supra* at 249. This Court emphasized in

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(footnote continued)
certified as a national class. *Coleman v. Block,* 100 FRD 705, 708 (D. N.Dak. 1983). On November 14, 1983, the district court extended its preliminary injunction to cover the newly expanded national class. On February 17, 1984, the preliminary injunction was made permanent. *Coleman v. Block,* 580 F.Supp. 194, 209-212 (D. N.Dak. 1984).

After the November 14, 1983 *Coleman* order extending the preliminary injunction for the benefit of the national class, the FmHA issued an "Administrative Letter" on December 20, 1983 prescribing the implementation of notice provisions to be given borrowers of their rights under 7 *U.S.C.* §1981a and prescribing a procedure for considering borrower requests for benefits. That implementation of 7 *U.S.C.* §1981a by the FmHA was, of course, too late to assist Petitioners in this case.

Wakinekona that a statute creates a protected liberty (or property) interest by causing "particularized standards or criteria (to) guide the . . . decision makers," *Wakinekona, supra* at 248, quoting *Connecticut Board of Pardons v. Dumschat,* 452 U.S. 458, 467, 69 L.Ed.2d 158, 101 S.Ct. 2460 (1981) (Brennan, J., concurring).

But, as observed last term in *Lyng, Secretary of Agriculture v. Payne,* 476 U.S. ____, 90 L.Ed.2d 921, 936 (June 17, 1986), this Court has never held that an applicant for statutory benefits, "as distinct from those already receiving them, (has) a legitimate claim of entitlement protected by the due process clause of the Fifth or Fourteenth Amendments." 90 L.Ed.2d at 936. This court noted the previous term in *Walters v. National Association of Radiation Survivors,* 473 U.S. ____, 87 L.Ed. 220, 232, n. 8 (1985) that a district court had made the same observation.

That issue is now and has been festering in the circuits in different statutory contexts. For example, the Ninth Circuit in considering §8 of the United States Housing Act as amended, 42 *U.S.C.* §1437f (1982), held in *Ressler v. Pierce,* 692 F.2d 1212 (9th Cir. 1982), that because the statute and the regulations imposed limitations on a federally subsidized owner's discretion in selecting tenants and because the statutory scheme recited the Congressional purpose of aiding lower income families in obtaining decent housing, an applicant for housing under the Act was entitled to a hearing. The Ninth Circuit in *Ressler* relied on *Geneva Towers Tenants Organization v. Federated Mortgage Investors,* 504 F.2d 483 (9th Cir. 1974).

On precisely the same issue, however, the Seventh Circuit in *Eidson v. Pierce,* 745 F.2d 453 (7th Cir. 1984) disagreed. That court held that notwithstanding the various criteria prescribed in the statute and the regulations, the ultimate decision on who would in fact receive housing and who would not was up to the owner. Moreover, the court observed that how the owner made that decision among eligible applicants was not prescribed in

either the statute or the regulations. 745 F.2d at 460-61. Rather, the Seventh Circuit noted that the owner remained "free to accept applications only from those persons he or she expects to be responsible tenants, and the §8 program does not constrain the owner's judgment on that question." *Id.* at 461.

The Seventh Circuit in *Eidson v. Pierce* distinguished *Goldberg v. Kelly* and the other public benefit cases where a property interest had been found, saying that the law involved in those cases "established eligibility criteria, and any person who satisfied those factual criteria was entitled to the benefits." 745 F.2d 461. Thus, the Seventh Circuit in *Eidson v. Pierce* said that "a hearing (in the *Goldberg v. Kelly* setting) would . . . be an effective remedy for the individual because it would provide the reliable means for resolving disputed facts entitling a person to benefits." *Id.* at 461.

But, the court in *Eidson* went on to state that it did not "mean to suggest that any element of discretionary judgment in determining the receipt of public benefits would defeat an asserted property interest." 745 F.2d at 462. The court observed that "elements of discretion or judgment are often involved in the application of legal criteria, and a hearing or judicial review might insure that the discretion was exercised in accordance with the relevant criteria." *Id.* But, the court said that while the "statute, regulations, and contracts (involved in *Eidson*) suggest(ed) information which might be relevant (in making a determination), they provide no guidance in weighing that information." *Id.*

Although the Seventh Circuit did not cite or purport to rely upon *Eidson* in arriving at its judgment in the instant case, its conclusion nonetheless is superficially consistent with *Eidson* in that it permits the element of discretion to defeat the existence of a property interest.[2] This, therefore, sets the Seventh Circuit

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[2] The Seventh Circuit's conclusion in this case, however, appears incorrect even under *Eidson* principles. This is true in that the *Eidson* court construed *Goldberg v. Kelly, supra* as saying a property interest

apart from the Ninth Circuit on whether or not a protected property interest and correlative right to be heard on an application for benefits is created under statutes such as 7 *U.S.C.* §1981a and the United States Housing Act as amended, 42 *U.S.C.* §1437f (1982).

Based on the two distinct approaches articulated by the Seventh and Ninth Circuits and the relative significance each ascribes to the element of discretion reposed in the agencies, the waters, to the extent they are charted at all, remain murky. Courts throughout the United States are essentially cast adrift to make determinations unguided by this court on the extent to which Congressionally created programs do create property interests in applicants for those programs where an element of discretion is reposed in the relevant agency officials. Indeed, except with specific reference to §8 of the United States Housing Act as amended, 42 *U.S.C.* §1437f (1982), within the geographic areas of the Seventh and Ninth Circuits, courts throughout the country attempting to employ principles to apply to this issue are essentially free to pick and choose between those principles employed by the *Eidson* and *Ressler* courts respectively. Consequently, courts will be making what are no more than ad hoc determinations on someone's right to be heard on his application for the benefits of a particular program created by Congress. See in this respect *Price v. Pierce,* 615 F.Supp. 173 (D.C. Ill., 1985), and *Hill v. Group Three Housing Development Corporation,* 620 F.Supp. 355 (D.C. Mo. 1985).

The actuality, therefore, is that access to Congressionally created programs is governed by the geographic region of the nation in which the applicant happens to reside. This state of

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(footnote continued)
was established once an individual showed he satisfied the eligibility criteria prescribed in the statute. Petitioners assert that once they show they satisfy the three substantive criteria prescribed in 7 *U.S.C.* §1981a, they are entitled to benefits. But, Petitioners were not even allowed to show they satisfied the eligibility criteria.

affairs certainly cannot be what Congress ever intended. This state of affairs does not make for the coherent application and administration of federal welfare programs. Nor, does it make for a just distribution of benefits. This Court should, therefore, address this issue and provide guidance not only respecting FmHA administration of 7 *U.S.C.* §1981a but other agency implementation of other statutes. This issue is ripe for resolution by this court. *Lyng, Secretary of Agriculture v. Payne, supra.*

CONCLUSION

For the reasons stated herein, Petitioners respectfully request that this Court grant a Writ of Certiorari to issue to the United States Court of Appeals for the Seventh Circuit and pursuant thereto reverse and vacate that portion of the Seventh Circuit's judgment which held that 7 *U.S.C.* §1981a created no property interest in applicants for benefits under that statute.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 85-2858

RANDALL F. CARSON and SUSAN CARSON,
Plaintiffs-Appellees,

v.

JOHN R. BLOCK, individually and as former Secretary of Agriculture, et al.,
Defendants-Appellants.

Appeal from the United States District Court
for the Central District of Illinois, Peoria Division.
No. 83-C-1073—**Michael M. Mihm,** *Judge.*

ARGUED APRIL 18, 1986—DECIDED MAY 19, 1986

Before CUMMINGS, *Chief Judge,* EASTERBROOK, *Circuit Judge,* and NOLAND, *District Judge.**

EASTERBROOK, *Circuit Judge.* Randall and Susan Carson bought a farm in 1977. In 1978 the Farmers Home Administration, a division of the Department of Agriculture, loaned the Carsons some money. The FmHA made more loans later. The

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* The Honorable James E. Noland, Chief Judge of the United States District Court for the Southern District of Indiana, is sitting by designation.

ten loans come to $375,000. In 1979 the Carsons became delinquent in repayment, and the FmHA accommodated them by a combination of forbearance and further loans. When the Carsons asked in December 1981 for permission to defer repayments, the County Supervisor of FmHA said no. The Carsons did not seek administrative review; instead they invoked the protection of the bankruptcy laws, and the bankruptcy court ordered the farm sold at an auction. The FmHA emerged as the buyer, and the Carsons later became the FmHA's tenants. The Carsons submitted an application for a new loan, in order to repurchase the farm, in December 1982. The county loan committee of the FmHA turned them down; the state director of the FmHA sustained this decision.

The Carsons want $6 million for their trouble, and they think former Secretary of Agriculture Block and seven other officials of the Department should chip in. They maintain that these eight officials are personally liable because the Department did not implement the payment-deferral program authorized by 7 U.S.C. §1981a until compelled to do so by several courts, including this one. See *United States v. Markgraf,* 736 F.2d 1179, 1182-84 (7th Cir. 1984), *cert. denied,* 105 S. Ct. 1154 (1985). Had the Department implemented the program, the Carsons insist, they could have kept their farm. They assert that the first, fourth, and fifth amendments to the constitution entitle them to monetary relief from the eight officials, relying on *Bivens v. Six Unknown Named Agents,* 403 U.S. 388 (1971). They also seek an injunction compelling the government to implement the deferral program and restore their farm.

The eight officials moved for summary judgment, to the extent the complaint sought damages from them personally, on the basis of absolute and qualified immunity. The district court denied the motion without stating reasons; a brief docket entry is its only trace. The officials immediately appealed, as *Mitchell v. Forsyth,* 105 S. Ct. 2806, 2815-17 (1985), and *Nixon v. Fitzgerald,* 457 U.S. 731, 742-43 (1982), allow. See also *Lojuk v.*

Johnson, 770 F.2d 619, 621 & n.2 (7th Cir. 1985), *cert. denied,* 106 S.Ct. 822 (1986). It does not matter that the district court's decision appears as a docket entry rather than a separate judgment under Fed. R. Civ. P. 58. *Mitchell* and *Nixon* allow appeals under the "collateral order" doctrine, and the essence of a "collateral" order is the absence of a final judgment on a separate document.

The genesis of the Carsons' complaint is the Department's failure to implement §1981a before it was too late. No statute requires a federal official to pay damages for inept administration of the law, let alone for adopting a construction of a law different from the one later selected by a court. The Carsons do not argue that §1981a establishes an implied private right of action for damages, and no court has held that it does. The Carsons therefore cannot get damages just because the defendants misunderstood §1981a, and to this extent the case does not involve immunity of any sort. Cf. *Davis v. Scherer,* 104 S. Ct. 3012, 3020 n.12 (1984) (violation of a statute dissipates immunity only if the statute also supports the claim for relief on the merits). Error in the implementation of §1981a may produce recovery only as a tort—either a "constitutional tort" under *Bivens* or a tort under a common law of Illinois. We assume for the sake of argument that the defendants' failure to implement §1981a might be deemed a tort, although it is difficult to see what kind.

Many cases say that federal officials have absolute immunity from liability for common law torts committed in the line of duty. See *Butz v. Economou,* 438 U.S. 478, 487-95 (1978); *Barr v. Matteo,* 360 U.S. 564 (1959); *Spalding v. Vilas,* 161 U.S. 483 (1896). Almost anything a federal official does has the potential to injure people—sometimes large numbers of people. Unless the officials were immune from liability for acts committed in the line of duty, they would spend inordinate amounts of time in court defending themselves. The fear of liability (coupled with the costs of the legal process and the fear of legal error)

may make officials too cautious in addition to distracting them. Private firms may buy insurance for their employees, or give them bonuses or shares of the enterprise to induce them to take risks. The United States does not offer the Secretary of Agriculture a "share of the profits" from federal programs awarding subsidies, and a system under which officials face risks of substantial liability for error without any corresponding prospect of reward for good work is doomed. Only the addled and the foolhardy would disregard these incentives, and the addled and foolhardy do not execute statutes very well. *Gregoire v. Biddle,* 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied,* 339 U.S. 949 (1950). See also Ronald A. Cass, *Damage Suits Against Public Officers,* 129 U. Pa. L. Rev. 1110, 1135-59 (1981).

Most of the Court's cases deal with absolute immunity from tort liability. They hold that officials have immunity against damages for losses caused by acts within the duties of their office. This way of stating the scope of immunity might suggest that losses caused by violations of statutes should be treated differently. The statute specifies the duties of the office, and it seems to follow that a violation of the statute cannot be within the duties of the office, and so there can be no immunity. It is not paradoxical, however, that an official can violate a statute as part of his duty of faithful execution. The scope of the immunity—acts in the line of duty—refers to the sort of activity that is immunized. The defendants injured the Carsons by acting on an application for deferral, in the scope of the normal activities of their jobs, rather than (say) by shooting them. An official acts in the line of duty when "the occasion . . . would have justified the act, had he been using his power for any of the purposes on whose account it was vested in him." *Gregoire v. Biddle,* 177 F.2d at 581. That the officials may have denied the application wrongly is irrelevant. An agency has the power to construe the statute as part of the power to execute it. That construction is within the line of duty and covered by absolute immunity. *Henderson v. Lopez,* No. 85-1514 (7th Cir. May 5,

1986); *Mother Goose Nursery Schools, Inc. v. Sendak,* 770 F.2d 668 (7th Cir. 1985), *cert. denied,* 106 S. Ct. 884 (1986).

If this case entails only a violation of law, the defendants have absolute immunity under *Barr* and *Spalding*. The Supreme Court has struck the balance differently for most "constitutional torts." See *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). The Carsons insist that the defendants violated the constitution and not just a statute, so that they need only overcome the qualified immunity defined in *Harlow* and our opinion in *Lojuk*.

The difference between a violation of the constitution and a violation of a statute is obscure, because the constitution commands obedience to statutes. Article II, sec. 3 requires the President to "take Care that the Laws be faithfully executed", and the Carsons say that this turns the Department's misinterpretation of §1981a into a violation of the constitution. This analysis obliterates all differences between constitution and laws, however, and it overlooks the source of the Supreme Court's decision not to apply absolute immunity to constitutional cases. Absolute immunity, if combined with a will be disobey, may weaken the substantive command. This usually does not do serious damage, because Congress may either override or create immunity no matter what the Court does. The obligation is within the control of the political branches, and these branches therefore are entitled to select the remedies for wrongdoing. *Martinez v. California,* 444 U.S. 277, 280-83 (1980). Absolute immunity is the Court's standby guess about what these brances would pick, were they to speak. The political branches also have little incentive to afford inadequate remedies for torts and violations of positive law. The political constituency that led to these rules also demands enforcement of them. Things are otherwise when the source of the substantive rule is the constitution. The political branches may not alter constitutional rules, and some rules were written into the fundamental law out of concern that the political branches would

alter them if they could. To afford absolute immunity as a general rule for violations of the constitution would be to achieve by indirection a result that is foreclosed.

The source of the substantive obligation—and not the label that is attached to the obligation—controls the immunity available to wrongdoers. The obligation to consider requests for deferral of repayment of loans comes from a statute, and therefore the officials are entitled to absolute immunity. This approach draws support from some other interactions between statutes and the constitution. For example, the supremacy clause of Art. VI requires states to respect federal statutes. The Supreme Court has held, however, that claims invoking the Supremacy Clause do not arise under the constitution. They arise only under the statute that supplies the rule of decision. *Swift & Co. v. Wickham,* 382 U.S. 111 (1965). Similarly, a federal court will not require a state to follow its own law, even though adherence to governing rules is an important ingredient of both due process and equal protection under the fourteenth amendment. See *Muckway v. Craft,* No. 85-1281 (7th Cir. Apr. 23, 1986); *Stern v. Tarrant County Hospital District,* 778 F.2d 1052 (5th Cir. 1985) (en banc); cf. *Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89 (1984).

So much for the argument that any violation of §1981a is a violation of the constitution. The Carsons also advance two more traditional claims. One, invoking the first amendment, is that officials of the Department retaliated against the Carsons for their speech. In November 1982 the FmHA scheduled a public auction at which it planned to sell the chattels the Carsons left at their farm when the FmHA took it over. The Carsons' brief states: "On the day of the sale, friends and neighbors of the Carsons and the Carsons, in a protest against what they felt had been the FmHA's improper failure to consider the [Carsons] for loan payment deferral treatment, protested and succeeded in 'shouting down' the auction sale." In retaliation for this, according to the complaint, local officials of the FmHA

"embark[ed] upon a campaign to thoroughly discredit and harm Plaintiffs in the eyes of their friends and supporters by disseminating information to various of the media . . . that Plaintiffs were poor managers of their farming operation; that Plaintiffs had 'abandoned' their farm and left their cattle to starve; and that Plaintiffs had improperly accounted for or converted secured property belonging to the FmHA, when, in fact, all such statements were absolutely and palpably false . . ."

This allegation of slander does not change the nature of the immunity. Libel and slander are not violations of the constitution. *Paul v. Davis,* 424 U.S. 693 (1976). Some of the most famous cases establishing absolute immunity involved malicious libel. See *Barr, Spalding,* and *Howard v. Lyons,* 360 U.S. 593 (1959). The immunity is absolute no matter the motive for the slander—preventing an inquiry into motive is one of the principal reasons for making the immunity *absolute.* Ours is not, however, the hard case of slander in response to constitutionally protected speech. "Shouting down" an auction is noise, not speech. The Carsons' "protest" was functionally the same as making an unbearable din with airhorns or throwing a stink bomb into the crowd. "Shouting down" another speaker is the antithesis of speech. The first amendment does not protect loud noises that prevent others from speaking or hearing. *Kovacs v. Cooper,* 336 U.S. 77 (1949).

The remaining claim is that the failure to implement §1981a violated the due process clause of the fifth amendment. Here is the argument: the statute entitles applicants to apply for deferrals of repayments; those who apply have a statutory right to be heard; the due process clause covers hearings; therefore the refusal to implement the statute was arefusal to hold hearings, in violation of the due process clause. There are several problems, each fatal. First, the failure to implement the statute at all was a legislative-type decision for which no individual hearing was necessary, see *Atkins v. Parker,* 105 S. Ct. 2520 (1985); *BiMetallic Investment Co. v. State Board of Equalization,* 239

U.S. 441 (1915). Once the Department made this class-wide decision, it did not need to give the Carsons a further hearing. Second, the fact that the statute affords some process does not mean that the due process clause requires the government to carry out the statute. See *Olim v. Wakinekona,* 461 U.S. 238, 248-51 (1983). Third, the due process clause of its own force requires particular procedures only when the decision "deprives" a person of "life, liberty, or property". Only property could be at issue here, and an interest is "property" only if there is an entitlement that stands or falls on the application of rules to facts. "To the extent a request appeals to discretion rather than to rules, there is no property." *Scott v. Village of Kewaskum,* 786 F.2d 338, 340 (7th Cir. 1986). The loan deferral program under §1981a gives the FmHA discretion. We established in *United States v. Markgraf,* 736 F.2d at 1185, that no one is entitled to deferral. The appeal is to discretion rather than to rules. The program therefore does not create a "property" interest. Regulations implementing the program might do so, see *Hewitt v. Helms,* 459 U.S. 460, 469-72 (1983), but the Carsons complain of the absence of regulations and therefore have no entitlements of this sort.

All that is left is the Carsons' argument that the defendants should have implemented the repayment deferral program sooner than they did. This depends wholly on the statute. The defendants are absolutely immune from liability in damages for claims of this sort. The district court therefore should have granted the motion for summary judgment and dismissed all claims against the defendants in their individual capacities.

REVERSED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

June 24, 1986

Before

Hon. Walter J. Cummings, Chief Judge
Hon. Frank H. Easterbrook, Circuit Judge
Hon. James E. Noland, District Judge*

No. 85-2858

Randall F. Carson and Susan Carson,
Plaintiffs-Appellees,

v.

John R. Block, individually and as
former Secretary of Agriculture, et al.,
Defendants-Appellants.

Appeal from the United States District Court
for the Central District of Illinois,
Peoria Division.
No. 83-C-1073
Michael M. Mihm, Judge

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* The Honorable James E. Noland, Chief Judge of the United States District Court for the Southern District of Indiana, is sitting by designation.

ORDER

Plaintiffs-appellees filed a petition for rehearing and suggestion of rehearing en banc on June 9, 1986. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

APPENDIX C

CIVIL DOCKET CONTINUATION SHEET

Docket No. 83-1073

Date 1985

Randall F. Carson & Susan Carson,
Plaintiff

v.

John Block, et al.
Defendant

PROCEEDINGS

Aug. 22	Oral ORDER ENTERED. ORDERED that (#48) MO To Dismiss or in the Alternative for S.J. is DENIED. Parties are to submit additional briefs on the issues of statute of limitations & propriety of jurisdiction, Gov'ts. by 9/4, Pltfs. resp. by 9/18. (copy of docket sheet sent to attys. by Clerk) (Mihm, J)

Supreme Court, U.S.
FILED
NOV 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 86-453

In the Supreme Court of the United States

OCTOBER TERM, 1986

RANDALL F. CARSON AND SUSAN CARSON, PETITIONERS

v.

JOHN R. BLOCK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners contend that the court of appeals erred by rejecting their claim that the alleged failure of various present and former officials and employees of the Department of Agriculture to implement a loan deferral program under 7 U.S.C. 1981a violated the Due Process Clause and entitled petitioners to pursue a $6 million damage claim against the officials and employees in their individual capacities under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

1. Petitioners purchased a farm in 1977 and subsequently obtained loans aggregating $375,000 from the Farmers Home Administration (FmHA). Al-

though petitioners became delinquent on their loans in 1979, they obtained some forbearance and additional loans. Petitioners contend that in 1981 they requested that their loan payments be deferred under 7 U.S.C. 1981a but that the FmHA County Supervisor denied their request. Instead of seeking administrative review, petitioners sought relief under the bankruptcy laws, and the FmHA eventually purchased the farm at auction. Petitioners became tenants of the FmHA on the farm and applied for a new loan to repurchase it in 1982. The county committee denied their loan application and the state director upheld that decision (Pet. App. A1-A2).

2. On March 23, 1983, petitioners sued then-Secretary Block and seven other officials of the Department of Agriculture, in their individual capacities. The complaint sought damages of $6 million on the theory that petitioners were injured by respondents' alleged failure to implement a loan deferral program under 7 U.S.C. 1981a, and by respondents' actions in connection with the sale of petitioners' farm.[1] The respondents moved for summary judgment on the damages claims, on the ground that they were protected by absolute or qualified immunity. The district court denied their motion in a minute order, with no explanation.

On respondents' appeal from that collateral order (see *Mitchell* v. *Forsyth*, No. 84-335 (June 19, 1985); *Nixon* v. *Fitzgerald*, 457 U.S. 731, 742-743 (1982)), the court of appeals reversed (Pet. App. A1-A8). The court noted (Pet. App. A3) that since petitioners do

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[1] The complaint included a second count, not pertinent here, seeking declaratory and injunctive relief against the officials and the FmHA based upon the alleged failure to consider their request for loan deferral under 7 U.S.C. 1981a.

not contend that 7 U.S.C. 1981a establishes a private right of action for damages, the claim is merely that respondents, acting in the course of their official duties, erred in implementing Section 1981a. That is conduct for which respondents cannot be liable in damages (see *Davis* v. *Scherer*, 468 U.S. 183 (1984)). As the court stated (Pet. App. A3): "federal officials have absolute immunity from liability for common law torts committed in the line of duty. See *Butz* v. *Economou*, 438 U.S. 478, 487-495 (1978); *Barr* v. *Matteo*, 360 U.S. 564 (1959); *Spalding* v. *Vilas*, 161 U.S. 483 (1896)."

The court also rejected petitioners' assertion that respondents' supposed misinterpretation of Section 1981a violated the Constitution. Petitioners' analysis, the court stated (Pet. App. A5), "obliterates all differences between constitution and laws * * *." Since "[t]he obligation to consider requests for deferral of repayment of loans comes from a statute," the court concluded, "therefore the officials are entitled to absolute immunity" (*id.* at A6).

The court also rejected petitioners' claim that respondents' alleged "failure to implement § 1981a" was a violation of the Due Process Clause of the Fifth Amendment (Pet. App. A7). First, the court concluded that no hearing was required because the agency had originally made a "legislative-type" decision not to implement the statute. Second, it held that even though the statute "affords some process," the Due Process Clause does not itself require the agency to implement the statute. *Id.* at A7, A8.

Finally, the court stated that the Due Process Clause protects only "life, liberty, or property" and Section 1981a does not create a "property" interest under the Fifth Amendment (Pet. App. A8). Rely-

ing upon its earlier decision in *United States* v. *Markgraf*, 736 F.2d 1179, 1185 (1984), cert. dismissed, 469 U.S. 1199 (1985), the court concluded that "no one is entitled to deferral [under Section 1981a]. The appeal is to discretion rather than to rules. The program therefore does not create a 'property' interest" (Pet. App. A8).

3. In this Court, petitioners challenge only the holding of the court of appeals that Section 1981a created no "property" interest (Pet. i). The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

This Court addressed and rejected an almost identical due process claim last Term in *Lyng* v. *Payne*, No. 84-1948 (June 17, 1986). In that case, this Court held that the court of appeals erred in requiring the Secretary of Agriculture to reopen an emergency farm loan program, which had been time-limited by Congress, on the theory that the Secretary had given defective notice of the program to potential recipients. The Court squarely rejected the farmers' claim that they had been denied due process because of allegedly inadequate notice of the loan program. Slip op. 16. First, the Court noted that it has "never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause * * *." *Ibid.* Second, the Court stated that, even if such a right existed, it was satisfied in that case by publication in the Federal Register. *Ibid.*

The decision in *Lyng* v. *Payne* disposes of petitioners' due process claim here. The court below correctly held that the opportunity to apply for loan

deferral does not itself constitute a property interest cognizable under the Due Process Clause. In any event, petitioners, who are charged with knowledge of Section 1981a (*FCIC* v. *Merrill*, 332 U.S. 380, 384-385 (1947)), concede in this case that they in fact knew of the provision and applied for deferral. See Pet. 4-5; Pet. App. A2. If, in fact, they made such a request, petitioners were in a position to pursue administrative remedies challenging the agency's denial of relief. See *Schweiker* v. *Hansen*, 450 U.S. 785 (1981). That petitioners failed to do.

But even if due process required something more than notice of the opportunity to apply for loan deferral assistance, there would still be no basis for granting the petition. In this $6 million damage claim against federal officials in their individual capacities, it is clear that at a minimum, respondents are protected by qualified immunity under *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). This Court recently reiterated that, in a *Bivens* action, an official "is immune unless his actions violated clearly established law." *Mitchell* v. *Forsyth*, slip op. 18. Petitioners cannot meet this standard. Section 1981a is, on its face, a broad grant of discretionary authority ("the Secretary may permit"). Indeed, petitioners' brief in the court of appeals (at 38) conceded "that the various cases specifically holding that 7 U.S.C. § 1981a created a mandatory duty upon the [respondents] were not decided until after the circumstances giving rise to the cause of action in this case." Even then, those cases held only that Congress required consideration of deferral requests as a statutory matter. No court has held that the Constitution requires such consideration.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

NOVEMBER 1986

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FILED
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(3)

No. 86-453

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RANDALL F. CARSON and SUSAN CARSON,

Petitioners,

vs.

JOHN R. BLOCK, *et al.*,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITIONERS' MEMORANDUM IN REPLY

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PETITIONERS' MEMORANDUM IN REPLY

1. The Respondents argue that this Court's decision in *Lyng v. Payne,* 476 U.S. ____, 90 L.Ed.2d 921 (1986) forecloses Petitioners' contention that 7 *U.S.C.* §1981a conferred upon them a property interest by "squarely reject(ing) the farmers' claim that they had been denied due process because of allegedly inadequate notice of the loan program." (Res. 4). That is not the case. First, *Lyng v. Payne* had nothing to do with 7 *U.S.C.* §1981a. Second, Petitioners' claim in this case relates not to notice of statutory benefits, but to their right to be heard on an application for statutory benefits, assuming, as Petitioners do, that they had notice. As argued in their Petition, this Court's dictum in *Lyng v. Payne* that it has "never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the due process clause of the Fifth or Fourteenth Amendments" illustrates the importance of the question posed by the Petitioners. *Lyng v. Payne, supra,* 90 L.Ed.2d at 936. The Petition for Certiorari

asks this Court to hold that applicants for statutory benefits, where they are identified as beneficiaries under the statutory scheme and where substantive limitations are placed on official discretion, have a claim of entitlement protected by the due process clause of the Fifth Amendment.

2. Evidently conceding that due process may have "required something more than notice of the opportunity to apply for loan deferral assistance" (Res. 5), Respondents argue that Petitioners' six million dollar damage claim[1] could not succeed because (i) Petitioners did not avail themselves of administrative remedies and (ii) Respondents are protected by *Harlow v. Fitzgerald,* 457 U.S. 800 (1982) qualified immunity. (Res. 5). The first point is incorrect because, as is clear from all the cases which have construed 7 *U.S.C.* §1981a enacted in 1978[2], Respondents had not implemented or did not have available the loan deferral program mandated by that section at the time Petitioners made their application for its benefits in December, 1981. (Pet. App. A8). There were, therefore, no benefits recognized by the FmHA, the denial of which Petitioners could have administratively pursued. *Id.*

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[1] Respondents, by reference to the amount prayed in Petitioners' ad damnum seem to scoff, as did the court of appeals, at the sum. However, at the time the complaint was filed, Petitioners, the heads of a household of four, alleged they had, as a proximate result of Respondents' actions, been dispossessed of their 145 acre farm, been dispossessed of their machinery and equipment, been dispossessed of their dairy parlor, and had been dispossessed of their 140 head of dairy cattle. Petitioners also alleged that they stood at the brink of the loss into the indefinite future of their livelihood and, perhaps less tangibly, but equally real, the loss of their way of life as family farmers. See *Carey v. Piphus,* 435 U.S. 247, 253 (1978).

[2] See *United States v. Hamrick,* 713 F.2d 69 (4th Cir. 1983); *Ramey v. Block,* 738 F.2d 756 (6th Cir. 1984); *United States v. Markgraf,* 736 F.2d 1179 (7th Cir. 1984); *Allison v. Block,* 723 F.2d 631 (8th Cir. 1983); *Matzke v. Block,* 732 F.2d 99 (10th Cir. 1984); and *Curry v. Block,* 738 F.2d 1556 (11th Cir. 1984).

3. Respecting qualified immunity under *Harlow v. Fitzgerald, supra,* Respondents appealed to the court of appeals under *Mitchell v. Forsyth,* 472 U.S. ____, 86 L.Ed.2d 411 (1985) from the district court's collateral order denying their motion for summary judgment on the issue of qualified immunity. Pet. 4, Pet. App., A-2, 3. The principal issue argued by the Respondents in the court of appeals was whether the Respondents were qualifiedly immune by reason of Petitioner's due process rights not yet being "clearly established". (Respondents' Brief in the Court of Appeals). The principal issue defended by Petitioners in the court of appeals was the district court's denial of Respondents' motion for summary judgment on the issue of qualified immunity. (Petitioners' Brief in the Court of Appeals). However, that issue was not addressed by the court of appeals, that court holding *inter alia* instead that 7 *U.S.C.* §1981a created no constitutionally protected property interest. Pet. App. A1-A8. That holding necessarily obviated any concern whether Respondents were qualifiedly immune respecting Petitioners' Fifth Amendment due process claim.

However, Petitioners submit that were they to ultimately prevail on the property interest question, qualified immunity would again become a live question in the context of this case. As such, Petitioners suggest that this Court's observation in *Davis v. Scherer,* 468 U.S. 183, 193, n. 11 (1984) that "state (or federal) law may bear upon a claim under the due process clause when the property interests protected by the Fourteenth (or Fifth) Amendment are created by state (or federal) law" posits the premise from which Petitioners should surmount Respondents' qualified immunity defense. As further stated by this Court in *Davis v. Scherer, supra,* "officials become liable for damages only to the extent that there is a clear violation of their statutory rights that give rise to the cause of action for damages." *Davis, supra* at 194, n. 12. In turn, this Court in *Davis, supra* said that "neither state nor federal officials lose their immunity by violating the clear command of a statute or regulation — of federal or of state law — unless that statute or

regulation provides the basis for the cause of action sued upon." *Davis v. Scherer, supra,* 468 U.S. at 194, n. 12. As construed by, for example, the Seventh Circuit in *Lojuk v. Johnson,* 770 F.2d 619 (7th Cir. 1985), the *Davis v. Scherer* formulation requires a determination whether or not the statute at issue "has some bearing on the constitutional right, as when the statute creates a substantive right that the due process clause then protects." *Lojuk v. Johnson, supra* at 629.

Petitioners contend that the statute in question, 7 *U.S.C.* §1981a, created a constitutionally protected property interest in their being considered for loan deferral benefits. When Respondents failed to implement or have available that statutory program resulting in Petitioners' application for benefits being summarily denied without any process at all, Petitioners were denied property without due process of law under circumstances where Respondents' violation of the statute "provid(ed) the basis for the cause of action sued upon." *Davis v. Scherer, supra* at 194, n. 12. Nevertheless, because the court of appeals did not address the *Harlow v. Fitzgerald* qualified immunity question, it is not before this Court. But, contrary to the Respondents' suggestion, Petitioners submit they can meet the *Harlow v. Fitzgerald* standard should it again present itself. Therefore, Petitioners respectfully submit that this Court should not take into account Respondents' anticipated qualified immunity defense in passing on their Petition for Certiorari.

For the reasons stated in their Petition and the reasons stated in this Reply, Petitioners respectfully submit that their Petition for the issuance of a writ of certiorari should be granted.

Respectfully submitted,

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